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# NO. 88-

## In the Supreme Court of the United States

October Term, 1988

RODNEY EUGENE BASKIN,
Petitioner

versus

THE STATE OF MISSISSIPPI,
Respondent

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ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE
STATE OF MISSISSIPPI

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PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. May a court, in sentencing a criminal defendant, base an enhancement of sentence upon the defendant's refusal to plea bargain or admit guilt and upon the fact that the defendant could have been convicted of a greater offense of which he was acquitted?

2. Are statements by the defendant admissible where they were made after the defendant's freedom of movement has been significantly curtailed but before ***Miranda*** warnings have been given?

3. May a police officer, testifying for the prosecution, refer to the defendant's refusal to answer questions during the booking procedure and after arrest?

4. Where a defendant has proved a *prima facie* case under ***Batson v. Kentucky***, and the prosecution has--after the decision in

***Batson***--been given opportunities to state non-discriminatory reasons but not done so, is a continued refusal to grant ***Batson*** relief a denial of due process?

## LISTING OF PARTIES

**Petitioner:**

Rodney Eugene Baskin

**Respondent:**

The State of Mississippi

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**THE STATE OF MISSISSIPPI**
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**ON WRIT OF CERTIORARI**
**TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

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## PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the opinion of the Supreme Court of Mississippi regarding the panel decision entered on May 18, 1988, and the denial of the Petition for Rehearing entered on August 17, 1988.

## OPINIONS BELOW

Supreme Court of Mississippi: The panel decision of the Supreme Court of Mississippi

and order denying rehearing are reported as ***Baskins v. State***, 528 So.2d 1120 (Miss. 1988)(Appendix at A.1).[1]

Circuit Court: The circuit court orders denying petitioner's post-trial motions (A. 10), and entering a judgment of sentence (A. 13), are unpublished.

## JURISDICTION

The opinion of the Supreme Court of the State of Mississippi was entered on May 18, 1988. A timely petition for rehearing was denied on August 17, 1988. On October 12, 1988, this Court granted an extension of the time to file this petition until November 15, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3) (1948).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

[1]Both the prosecution and the Mississippi Supreme Court referred to the petitioner as "Baskins", although the correct spelling of his name is Baskin. This petition uses the correct spelling, except in reference to the reported decision.

U.S. Const. amend. V

> "No person...shall be compelled in any Criminal Case to be a witness against himself...."

U.S. Const. amend. VI

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed,...and to have the Assistance of Counsel for his defence."

U.S. Const. amend. XIV, §1

> "....No state shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF THE CASE

### (a) Procedural History

Rodney Baskin was indicted in the Circuit Court of Lafayette County, Mississippi, for possession of more than one ounce of marijuana with intent to distribute. R. 3. During trial, the Prosecution, over objection, exercised all its peremptory challenges on black jurors. R. 80-82, 85-86, 274-86, 329-

330. Also at trial, a police officer over objection testified: Rodney Baskin had refused to answer questions during interrogation subsequent to his arrest, R. 104-105, and Baskin made statements after arrest but prior to warnings required by ***Miranda v. Arizona***, 384 U.S. 436 (1966). R. 93-94, 96-97.

Rodney Baskin was convicted of simple possession but was acquitted of possession with intent to distribute. At sentencing, the trial court expressly justified its imposition of the maximum sentence by stating that: (1) Baskin had exercised his right to a trial; (2) Baskin could have been convicted of intent to sell on the evidence; and (3) Baskin did not admit that he had "sinned". R. 258-259.

The verdict and sentence were appealed. Baskin asserted as error: the officer's comment on Baskin's silence; the ***Miranda*** issue; the sentencing issue; and the prosecution's use of peremptory challenges to exclude blacks. ***See*** Assignments of Error in

the Supreme Court of Mississippi (listing issues raised on appeal). The court held all but peremptory challenges issue to be "meritless," ***Baskins***, 528 So.2d at 1121; A. 3, and remanded for a hearing to give the prosecution a third[2] opportunity to give non-discriminatory reasons for their exercise of peremptory challenges. ***Baskins***, 528 So.2d at 1122; A. 7-8. Baskin filed a petition for rehearing, which was denied on August 17, 1988. A.1.

**(b) Preservation of Error**

Four issues are raised in this petition: (1) an issue concerning the prosecution's use of challenges instructions; (2) an issue concerning Rodney Baskin's right to remain silent; (3) a ***Miranda*** issue; and (4) an issue raising the constitutionality of enhancement

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[2]The prosecution had an opportunity to give non-discriminatory reasons when defense counsel first raised the issue at trial. R. 329-330. The prosecution had a second opportunity at a post-trial hearing. R. 276-286.

of a sentence for exercise of constitutional rights.

The second and third issues--the police officer's comment on Baskin's silence and the ***Miranda*** issue--were first raised when the prosecution offered the evidence at trial. ***See*** R. 93-94 (pre-***Miranda*** statements offered, contemporaneous objection overruled); R. 104-05 (comment on silence, contemporaneous objection overruled). The sentencing issue was raised in a post-trial motion filed immediately after judgment of sentence. R. 265.

The remaining issue relates to the prosecution's exercise of peremptory challenges. After the tendering of jurors and peremptory challenges, defense counsel objected to the prosecution's use of peremptory challenges. R. 329-330; ***see Baskins***, 528 So.2d at 1121-22; A. 5-7 (stating facts concerning raising of peremptory instruction issue).

The four issues were again raised by assignment of error on appeal. The Court ruled all but the peremptory instruction issue were "totally meritless". ***Baskins***, 528 So.2d at 1121; A. 3. The court ruled the peremptory instruction issue "successfully raised," ***Baskins***, 528 So.2d at 1122; A. 7, and went on to reverse and remand the case for a hearing to give the prosecutors a third opportunity to state reasons for their exercise of peremptory challenges. ***Baskins***, 528 So.2d at 1122; A. 7-8. In a motion for a rehearing, Rodney Baskin asserted that, because he had shown that he was entitled to relief on the peremptory challenges issue, the court would deny due process to continue in their refusal to grant such relief. Rehearing Petition at 5-6. The court denied the petition for rehearing. A. 1.

## REASONS FOR GRANTING THE WRIT

### FIRST QUESTION

**MAY A COURT, IN SENTENCING A CRIMINAL DEFENDANT, BASE AN ENHANCEMENT OF SENTENCE ON THE DEFENDANT'S REFUSAL TO PLEA BARGAIN OR ADMIT GUILT AND UPON THE FACT THAT THE DEFENDANT COULD HAVE BEEN CONVICTED OF A GREATER OFFENSE OF WHICH HE WAS ACQUITTED?**

#### A. This Case Poses A Significant Federal Question Concerning The Standard For Evaluating Trial Court Enhancement of Sentence Due To Defendant's Exercise Of His Constitutional Rights

This case presents an issue about defendant's exercise of constitutional rights as a factor in criminal sentencing. At sentencing, the trial court rejected consideration of comparable cases[3] proved by the defendant because Baskin had neither plead guilty nor admitted his guilt. R. 258. The court then stated that Baskin had failed to make "an admission of guilt", and that this was "relevant in any sentencing decision."

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[3]Rodney Baskin put on proof of the sentence for each drug conviction in Lafayette County since 1982. R. 246.

*Id.* Finally, the court held that the jury could have convicted Baskin of a greater offense, possession with intent to distribute rather than mere possession, and that this supported an enhanced sentence. R. 259. The court thus based the sentence on an act for which Baskin was acquitted, his assertion of the right to remain silent, and assertion of the right to a trial.

This Court has decided cases on sentence enhancement for exercise of constitutional rights where: (1) a sentence was increased because the defendant had appealed, ***North Carolina v. Pearce***, 395 U.S. 711, 724 (1969); or (2) where the trial court considered non-cooperation as a factor in imposing sentence. In the second instance, this Court has held that a trial court can consider non-cooperation as a factor in criminal sentencing, but also recognized that the defendant's Fifth Amendment rights can be implicated when cooperation was considered.

***Roberts v. United States***, 445 U.S. 552, 559-61 (1980). By this recognition, this Court also implicitly recognized that the Fifth Amendment imposed a limit on the use of non-cooperation as a factor. However, this Court did not define such a limitation. There are three constitutional interests involved here: the right to silence, the right to a jury trial, and the acquittal. The question of what standard is to be used in evaluating trial court consideration of the exercise of rights is an issue common to all three interests.

Several methods of analysis have been used by the lower courts to determine whether non-cooperation was improperly considered. Some courts have held that it was permissible to refuse leniency but impermissible to increase severity for refusal to cooperate. ***See United States v. Stratton***, 820 F.2d 562, 564 (2nd Cir. 1987)(holding that there was "a distinction between increasing the severity of a sentence for a defendant's failure to

cooperate and refusing to grant leniency"). Others have doubted the usefulness of a distinction between increasing a sentence and refusal of leniency. ***See United States v. Carter***, 804 F.2d 508, 515 (9th Cir. 1986)(Reinhardt, J., dissenting)(stating that such distinctions undermine the principle prohibiting use of the sentencing power to punish defendants for exercise of constitutional rights). This has lead at least one circuit to impose a rule that requires, once there appears evidence that would support an inference of punishment for exercise of constitutional rights, the record must affirmatively show that such punishment did not occur. ***United States v. Stockwell***, 472 F.2d 1186, 1187-88 (9th Cir.), ***cert. denied***, 411 U.S. 948 (1973); ***see United States v. Hutchings***, 757 F.2d 11, 14 (2nd Cir.), ***cert. denied***, 472 U.S. 1031 (1985)(language to similar effect). Under this analysis, the lower court should have reversed, as the only

evidence in the record shows punishment occurred.

Following the leniency/increase distinction, the Second Circuit found it error that the trial judge "specifically stated that the sentences would run consecutively because of Stratton's refusal to cooperate." ***Stratton***, 820 F.2d at 564. By contrast, in Rodney Baskin's case, the lower court found no error in the trial court's specific statement that it was imposing a harsher sentence because Rodney Baskin had made no "admission of guilt". ***See*** R. 258 (trial court statement); ***Baskins***, 528 So.2d at 1121; A. 3 (ruling on this issue). Baskin's sentence would also have been error in the Fifth Circuit, which has held that imposition of a harsher sentence because of a refusal to admit guilt at a sentencing hearing was reversible error. ***Thomas v. United States***, 368 F.2d 941, 946 (5th Cir. 1966).

The lack of a consistent rule or test has lead to demonstrably inconsistent results. In the absence of a proper standard articulated by this Court for evaluating this issue, the lower courts have created no consistent rule to determine at what point consideration of non-cooperation or exercise of other constitutional rights becomes sentencing error. The Mississippi Supreme Court has also failed to reach this determination and has made no attempt to evaluate the propriety of allowing judicially enhanced sentences to stand.

### B. This Case Poses A Significant Federal Question Concerning Whether A Trial Court Can Enhance A Sentence Because The Defendant Has Exercised His Right To A Jury Trial And Because The Defendant Could Have Been Convicted Of A Greater Offense

This Court has not decided the constitutionality of sentence enhancement in cases involving constitutional rights other than the right to remain silent and the due process/appeal rights involved in ***Pearce***.

Rodney Baskin's sentence was enhanced for his exercise of his right to a jury trial and because of the trial court's opinion that he could have been convicted of the greater offense on which he was acquitted. The Second and Ninth Circuits have held it improper to increase the severity of sentence as punishment for exercising the constitutional right to stand trial. ***Carter***, 804 F.2d at 513; ***United States v. Araujo***, 539 F.2d 287, 292 (2d Cir.), ***cert. denied***, 429 U.S. 983 (1976).

Related to the issue of enhancement for acquittal, the Ninth Circuit has held it to be an abuse of discretion to enhance a sentence based on "[u]nreasonable inferences and material assumptions" not supported by the record; therefore, sentences must be vacated if it is demonstrated the court relied upon such false and unreliable information. ***United States v. Safirstein***, 827 F.2d 1380, 1385-87 (9th Cir. 1987)(sentence vacated because the

trial court enhanced sentence based on inference that defendant participated in a crime for which he was not charged). Following this analysis, enhancing a sentence based on an act for which the defendant was acquitted would be "[a] sentence based upon...'misinformation of a constitutional magnitude'", *Id.* at 1387, and therefore an improperly based sentence.

Under the analysis applied in the Ninth Circuit, sentence enhancement based on crimes that lead to an acquittal would be reversible error. Further, under the analysis applied in the Second and Ninth Circuits, sentence enhancement based on exercise of the right to a jury trial would be reversible error. The lower court in this case found sentence enhancement for both reasons to be acceptable. This Court should grant certiorari to determine whether such enhancement violates the constitution.

*SECOND QUESTION*

**ARE STATEMENTS STATEMENTS ADMISSIBLE WHERE THEY WERE MADE AFTER THE DEFENDANT'S FREEDOM OF MOVEMENT HAD BEEN SIGNIFICANTLY CURTAILED BUT BEFORE *MIRANDA* WARNINGS HAD BEEN GIVEN?**

**This Case Poses A Significant Federal Question As To Whether Miranda Warnings Are Required After An Arrest Made During The Execution Of A Search Warrant.**

For ***Miranda*** warnings to be given, this Court has required that there be custody and interrogation. ***Miranda v. Arizona***, 384 U.S. 436, 444 (1966). The test for whether interrogation has occurred is whether, under the circumstances, the police conduct was such that "the police should know [that it] is reasonably likely to evoke an incriminating response from a suspect." ***Rhode Island v. Innis***, 446 U.S. 291, 301 (1980).

In the case at bar, the police served a search warrant at Rodney Baskin's residence. R. 144, 155. Upon entering the apartment, they told everyone to sit down and be still. The police then posted a guard at the door.

R. 89, 145. It is clear that the police had "deprived [Baskin] of his freedom of action in [a] significant way" by their conduct. ***See New York v. Quarles***, 467 U.S. 649, 655 (1984) ("restraint on freedom of movement" constitutes an arrest); ***see Miranda***, 384 U.S. at 444 (using deprivation of freedom as test for ***Miranda*** warnings).

At this point, Baskin asked if he and the policeman could talk, then took the policeman to a shoe box containing marijuana. R. 93-94, 95-96. The Mississippi Supreme Court ruled an objection to this proof "totally meritless". ***Baskins***, 528 So.2d at 1121; A. 3.

This Court's cases defining the limits of the interrogation requirement have never reached the issue of when the service of a search warrant becomes an interrogation under ***Miranda***. In ***Innis***, this Court stated that the question of whether interrogation occurs turns on the perceptions of the suspect. The issue is whether circumstances were such that the

officers should have known they were likely to elicit an incriminating response. ***Innis***, 446 U.S. at 301-02. The Mississippi Supreme Court completely failed to analyze the facts--to examine whether interrogation had occurred from any perspective. This Court should grant certiorari to resolve the question of whether an arrest combined with a search warrant amount to an interrogation, requiring that ***Miranda*** warnings be given.

## *THIRD QUESTION*

## MAY A POLICE OFFICER, TESTIFYING FOR THE PROSECUTION, REFER TO THE DEFENDANT'S REFUSAL TO ANSWER QUESTIONS DURING BOOKING PROCEDURES AND AFTER ARREST?

### This Case Poses A Significant Federal Question As To The Analysis Of Prosecution Comment On Defendant's Post-Arrest Silence In Cases Where The Defendant Does Not Testify

This Court has established that it is improper to comment on a defendant's invocation of his Fifth Amendment right

against self-incrimination,[4] and has further established that the issue of whether improper comments are reversible error is evaluated under the harmless error rule.[5] In developing the analysis in silence cases, this Court has not yet reached an important issue: the proper analysis where there is comment upon defendant's post-arrest, pre-trail silence when the defendant does ***not*** testify at trial. This court has also not decided the issue of whether a harmless error analysis must be explicit. Here, a police officer stated that the defendant had refused to answer questions during booking procedures. R. 104-05. The Mississippi Supreme Court viewed an objection as "totally meritless." ***Baskins***, 528 So.2d at

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[4]***Doyle v. Ohio***, 426 U.S. 610, 617-20 (1976)(comments on defendant's post-arrest silence in attempt to impeach his testimony would not be tolerated); ***Griffin v. California***, 380 U.S. 609, 613 (1965)(comments on a defendant's failure to testify violated defendant's Fifth Amendment rights).

[5]***Chapman v. California***, 386 U.S. 18, 21-22 (1967).

1121; A. 3. This presents no analysis at all. It is impossible to tell whether the court believed there to be no constitutional error or whether the court thought error harmless. This Court *has* indicated that harmless error analysis is required to *reverse* for silence issues. ***United States v. Hasting***, 461 U.S. 499, 505 (1983). While it would seem that the converse would be necessarily true for purposes of appellate supervision, ***Hasting*** does not resolve this issue.

This Court's silence cases have either dealt with instances where the defendant has testified and there was comment on silence during post-arrest procedures or incarceration,[6] or instances where there was comment on the defendant's failure to testify

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[6] ***See, e.g., Doyle***, 426 U.S. at 611 (holding, in a case where defendant testified, that prosecution comment on defendant's failure to testify was error).

at trial.[7] Rodney Baskin was silent during post-arrest procedures and did not testify at trial, and thus exercised the right to silence twice. Further, by raising the pre-trial comment, the prosecution has brought up silence about which the jury would have no knowledge, silence that the jury is likely to weigh inappropriately. ***See United States v. Hale***, 422 U.S. 171, 180 (1975)(evidence of silence at time of arrest is not very probative, and likely to be weighed too heavily by jury). The impact on the defendant's case would be far greater than in cases where the comment was upon a fact the jury itself had observed: the failure to testify at trial. The fact that comment on pre-trial silence has this effect has been persuasively argued as a basis for rejecting the ***Griffin*** analysis in cases such as this:

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[7]***See, e.g., Griffin,*** 380 U.S. at 613 (holding that comment on defendant's failure to testify at trial was error).

> The burden on the pretrial exercise should not be ignored. A comparison of the two burdens suggests that the burden on pretrial exercise is actually heavier. The jury observes the defendant's failure to testify at trial even if neither the prosecutor nor the judge comments on that silence. Therefore, only a slight additional burden arises when a judge or prosecutor is permitted to comment. By contrast, the jury is entirely unaware of an accused's pretrial silence unless evidence of that silence is admitted at trial.
>
> -Poulin, ***Evidentiary Use of Silence and the Constitutional Privilege Against Self-Incrimination***, 52 Geo. Wash. L. Rev. 191, 210 (1984).

At minimum, it is far less likely that the comment on silence was harmless.

Among the Circuit Courts of Appeal, only the Fifth Circuit has dealt with this issue, holding in ***United States v. Edwards***, 576 F.2d 1152, 1154 (5th Cir. 1978), that comments on post-arrest silence should be analyzed following the same method as comments upon failure to testify. This analysis ignores the problem highlighted by Poulin: that pre-trial silence is inherently different from trial

silence because the jury does not know about pre-trial silence. Yet the Mississippi Supreme Court has ignored both the standard suggested by Poulin and the standard followed in ***Edwards***.

By holding the silence issue in this case "totally meritless", ***Baskins***, 528 So.2d at 1121; A. 3, the Mississippi Supreme Court used no analysis at all. Guidance is called for from this Court as to whether there must be explicit harmless error analysis where claims of unconstitutional comments on silence are rejected. Furthermore, guidance is called for as to how, in cases where the defendant is silent both at trial and pre-trial, a comment upon pre-trial silence is to be analyzed.

**FOURTH QUESTION**

**WHERE A DEFENDANT HAS PROVED A *PRIMA FACIE* CASE UNDER *BATSON V. KENTUCKY*, AND THE PROSECUTION HAS--AFTER THE DECISION IN *BATSON*--BEEN GIVEN OPPORTUNITIES TO STATE NON-DISCRIMINATORY REASONS BUT NOT DONE SO, IS A CONTINUED REFUSAL TO GRANT *BATSON* RELIEF A DENIAL OF DUE PROCESS?**

**This Case Presents A Susbstantial Federal Issue As To The Application Of This Court's Decision In *Batson V. Kentucky***

This Court has recently shown continued interest in both issues arising under ***Batson v. Kentucky***, 476 U.S. 79 (1986). In ***Tompkins v. Texas***, 56 U.S.L.W. 3789 (U.S. May 6, 1988)(No. 87-6405), this Court is going to consider the question of whether the Texas Courts are properly following this Court's mandate in ***Batson***.[8] This case presents a similar issue as to whether the Mississippi Supreme Court is properly following ***Batson***.

In the Mississippi Supreme Court, Rodney Baskin raised violation of the standard in ***Batson***. The Mississippi Supreme Court refused to grant relief. ***Baskins***, 528 So.2d at 1122;

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[8]The issue in ***Tompkins*** is whether the Texas courts were accepting facially dubious explanations from prosecutors. 57 U.S.L.W. 3027 (summarizing issues presented). This Court granted review of a related issue in ***Teague v. Lane***, 56 U.S.L.W. 3608 (U.S. March 7, 1988)(No. 87-5259), a case raising issues concerning prosecution use of peremptory challenges under pre-***Batson*** law. 57 U.S.L.W. 3026 (summarizing issues presented).

A. 7-8. Instead, it remanded to give the prosecution yet another opportunity to state non-discriminatory reasons for their use of peremptory challenges. **Yet there has already been a hearing after *Batson* was decided,[9] at which the prosecution conceded that it could give no reasons.[10]**

In the trial court, the petitioner established grounds for relief.[11] At trial,

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[9]The hearing occurred on May 16, 1988. R. 269. ***Batson***, which had been decided on April 30, 1988, was discussed repeatedly at the hearing; the prosecutors were specifically asked about the ***Batson*** opinion. R. 274-75, 280-82, 286-87.

[10] ***See*** R. 275-76, 280-284, 285-286(none of the prosecutors were able, when called as witnesses in ***Batson*** hearing, to advance non-discriminatory reasons); ***see*** R. 282 (one prosecutor stating he was aware of the recent decision in ***Batson***).

[11]The defendant is black. R. 109, 275. The prosecution used all six peremptory challenges to remove blacks from the venire, thereby removing all but one of the blacks remaining on the panel after challenges for cause. R. 289-92, 271. Three of the blacks so removed had made no responses during voir dire. R. 62-80. The only black remaining on the panel was beyond the reach of the prosecution's peremptory challenges. R. 272,

the prosecution was given opportunities to state legitimate reasons for its use of strikes, and refused. The Mississippi Supreme Court nevertheless proposes to remand for another hearing and another appellate proceeding on this issue. There can be no doubt that, if a defendant similarly defaulted--that is, failed to make a required

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289-91. Furthermore, the prosecution was allowed to use an additional five cause challenges--the only cause challenges that it made--to remove additional blacks. R. 80, 271. These challenges were in themselves weak. Three involved jurors who stated that they knew the defendant but stated that knowing the defendant would not stand in the way of their being fair jurors. R. 72-75 (responses of jurors Tyson, Deldidge, and Archie). Furthermore, three of the black jurors so stricken made identical reponses to other white jurors not removed for cause. R. 73-74. In fact, the trial court refused a defense request to remove a white juror while granting prosecutions challenges for cause based upon identical answers. R. 81-82. This evidence points solely toward a ***prima facie*** case of discrimination. See ***Batson***, 54 U.S. at 96 (listing elements of ***prima facie*** case). The prosecution, having been given three opportunities--see note 2, supra--failed to come forward with any reason for its use of strikes. It is, therefore, clear from this record that the petitioner is entitled to ***Batson*** relief.

showing and/or objection at the first opportunity--the Mississippi Supreme Court would hold the defendant procedurally barred by such a default. ***See Thomas v. State***, 517 So.2d 1285, 1287-88 (Miss. 1987)(holding ***Batson*** claims barred where not raised at time jury impaneled).

Multiple hearings are not the only barriers the Mississippi Supreme Court uses to deny ***Batson*** relief. While the Mississippi Supreme Court will allow the prosecution to state reasons with utterly no record support,[12] the Mississippi Supreme Court demands the defendant to offer proof to establish those reasons are pretexts.[13] To further narrow ***Batson*** relief to the smallest

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[12]***E.g., Johnson v. State***, 529 So.2d 577, 584 (Miss. 1988)("The state's information from law enforcement as to the possibility of...[a juror's] involvement in criminal activity is not in the record, but again, it does not have to be.").

[13]***E.g. Chisolm v. State***, 529 So.2d 635, 638-39 (Miss. 1988).

possible group of cases, the court also uses the most deferential possible standard of review,[14] including the acceptance of completely subjective excuses,[15] and providing of an appendix listing possible excuses prosecutors might use.[16] The court applies a stringent procedural bar for defense counsel,[17] and a policy of allowing repeated opportunities to the prosecution to cure its defaults in giving reasons.[18] Using these measures, the Mississippi Supreme Court has avoided granting relief in all but one of its ***Batson*** cases, granting relief only in a case

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[14]***E.g.***, ***Lockett v. State***, 517 So.2d 1346, 1351-52 (Miss. 1987).

[15]***E.g.***, ***Johnson***, 529 So.2d at 585 (stating a prosecutor's statement of his "sense" of a juror's "demeanor" provides a basis for challenges).

[16]***Lockett***, 517 So.2d at 1356-57 (appendix listing excuses).

[17]***E.g. Jones v. State***, 517 So.2d 1295, 1298 (Miss. 1987).

[18]The prosecution was allowed repeated opportunities in the case at bar.

where the prosecution "admitted that black jurors were excused because the defendant was black."[19]

The Mississippi Supreme Court is raising unwarranted procedural barriers to relief that this Court has held must be given. **This barrier is not unique to this case;** in ***Batson*** cases, the Mississippi Supreme Court has consistently refused relief altogether or remanded for a hearing to be followed by yet another appellate proceeding.

Rodney Baskin is entitled to have relief on the merits of his claim. It is due process at its most basic to require that relief be granted once entitlement to relief is shown. The Mississippi Supreme Court is seeking to avoid the mandate of this Court in ***Batson*** by

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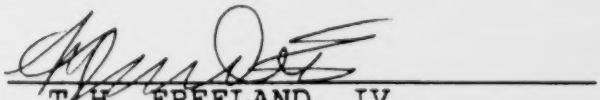
[19]***Goggins v. State***, 529 So.2d 649, 652 (Miss. 1988). In ***Goggins***, one Justice--joined by the Justice who wrote the opinion in the case at bar--dissented, stating that **in spite of the prosecution admission**, relief should not be granted if the prosecution could come up with non-discriminatory reasons! ***Goggins***, 529 So.2d at 654-55 (Hawkins, J., dissenting).

use of the aforementioned procedural barriers. To put the petitioner through another hearing on this issue is to place an unfair and unjustifiable burden upon the exercise of his constitutional rights. This Court should grant certiorari to assure enforcement of this Court's mandate in ***Batson***.

WHEREFORE, in view of the foregoing reasons, petitioner respectfully urges this Court to grant the writ to review the decision of the Mississippi Supreme Court.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I, T.H. FREELAND, IV, counsel of record for the petitioner, hereby certify that I have this day mailed, postage prepaid, three true and correct copies of the above and foregoing Petition for Writ of Certiorari to the following, to wit:

Larry Little, Esquire
District Attorney
Post Office Box 349
Oxford, Mississippi 38655

Honorable Mike Moore
Attorney General
State of Mississippi
Post Office Box 220
Jackson, Mississippi 39205

DATED: This the 4th day of November, 1988.

T.H. Freeland, IV

IN THE SUPREME COURT OF MISSISSIPPI
DECISIONS HANDED DOWN AUGUST 17, 1988

***

**THE COURT SITTING EN BANC:**

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57,786 Rodney Eugene Baskins v. State; Circuit, Lafayette; Petition for Rehearing Denied.

***

ONLY CASES MARKED "X"
HAVE WRITTEN OPINIONS

Respectfully Submitted

Sue Gordon, Clerk
Yvonne P. Burnham, Chief D.C

IN THE SUPREME COURT OF MISSISSIPPI

NO. 57,786

RODNEY EUGENE BASKINS,
a/k/a Tarzan

v.

STATE OF MISSISSIPPI:

BEFORE ROY NOBLE LEE, C.J.,
ANDERSON and GRIFFIN, JJ.

GRIFFIN, JUSTICE, FOR THE COURT:

Rodney Eugene Baskins, a/k/a Tarzan, appeals the judgment of the lower court in which he was convicted of simple possession of more than one ounce of marijuana in violation of Miss. Code Ann. §41-29-139(c)(2)(c) (Supp. 1986), and sentenced to serve three (3) years in the Mississippi Department of Corrections and pay a fine of $1,500. We have reviewed thoroughly all the evidence and discussed his assigned error as to his voir dire trial, sentence and the admissibility of

certain evidence. And, with the exception of the raised issue of ***Batson v. Kentucky***, 476 U.S.____, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), in which the defense challenges the State's use of all its peremptory challenges to exclude blacks from the jury without specifically neutral explanation or justification, we have found all other errors cited to be totally meritless. However, because of ***Batson***, we deem it necessary to remand to the lower court.

Since the record is unclear as to whether there has been a waiver of his Batson claim, we believe it necessary to remand for a hearing on the Batson issue.

On April 17, 1985, Detective Andy Waller of the Oxford Police Department obtained a search warrant for Building 120, Apt. #2 of Eastview Homes in Oxford, Lafayette County, Mississippi --

the residence of Rodney Eugene Baskins, a/k/a Tarzan -- for marijuana, cocaine and all related drug paraphernalia, contraband and instrumentalities used in the commission of a crime. Officer Waller was accompanied by Patrolmen Mike Martin and Lyndon Carpenter. Inside the apartment were Baskins, Annie Ruth Manning, Tennie Phillips, Arthur Pettis and Manning's small child. Waller knocked at the door and was told to come in. He entered the apartment and handed the search warrant to Baskins. Waller then told everyone else to stay still.

As a result of the search, several boxes containing bags of marijuana and a set of scales were found. Later testimony by Joe Lee Williams, a state forensic drug analyst, showed the weight of the marijuana totalled 521.6 grams or approximately 16.6 ounces of the drug.

Baskins was indicted on July 31, 1985, for possession of more than one ounce of marijuana with intent to distribute. Immediately after tendering of jurors and the peremptory challenging thereof, counsel for defendant approached the lower court for the purpose of making a record of the race of each juror on the entire venire and to make a motion to quash based on the State's actions, which produced a panel of 11 whites and 1 black.

In a Bill of Exceptions entered by the lower court on May 20, 1986, after the conclusion of Baskins' trial, the trial judge states that he ordered defendant's attorney to refrain from making his motion to quash the panel and requests for proofs regarding the race of the jurors until after the court had the opportunity to seat and swear in the jury and to allow opening arguments.

Further, the Bill of Exceptions states that defendant's attorney made his motion to quash the jury panel after the jury was seated and sworn in, and after opening arguments were completed, with the same effect as if timely made.

Finally, the Bill of Exceptions notes that "[t]he record does not reflect the requests that the defendant's attorney made to the court, before the jury was seated and sworn in, and this Bill of Exceptions is therefore made to supplement the record to reflect the timeliness of the defendant's attorney's motion to quash the jury panel and the request that a record of the race of each juror of the venire be made. Such motion to quash of the jury venire, subsequently heard and allowed, were timely made and should therefore relate back to before the jury was seated and sworn."

At a post-trial hearing on a motion for a new trial, the appellant did show that the State exercised all of its peremptory challenges in excluding blacks. At this time, the ***Batson*** opinion had not been rendered so the district attorney did not come forward with neutral, non-race explanations for his peremptory challenges.

For the reasons stated, we find that Baskins has successfully raised a ***Batson*** issue within the parameters of our procedural guidelines, which provide that failure of defense counsel to timely object to the State's peremptory challenges bars later attempts to advance that claim on appeal. ***Thomas v. State***, 517 So.2d 1285, 1286 (Miss. 1987). ***See also, Irving v. State***, 498 So.2d 305 (Miss. 1986).

No such waiver occurs in the case at bar, and defendant's refusal to

accept the jury in its present state allowed later challenge to its composition. ***See, e.g., Watkins v. State***, 262 So.2d 422 (Miss. 1972); ***Holloway v. State***, 242 So.2d 454 (Miss. 1970).

Following what we said in ***Williams v. State***, 507 So.2d 50 (Miss. 1987), this case is remanded to the circuit court with instructions that a hearing be conducted as provided in ***Williams, supra***, and should it be found there was purposeful discrimination, a new trial shall be ordered but on the other hand, should no impermissible discrimination be found, a return shall be made to this Court containing the record of such hearing and the findings of fact therein.

**REMANDED**

ROY NOBLE LEE, C.J.; HAWKINS and DAN LEE, P.JJ.; PRATHER, ROBERTSON, SULLIVAN, ANDERSON, and ZUCCARO, JJ., CONCUR.

IN THE CIRCUIT COURT OF

LAFAYETTE COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

VS. No. 11,894

RODNEY BASKIN, Defendant.

ORDER OVERRULING DEFENDANT'S
POST TRIAL MOTIONS

This cause came on to be heard on May 16, 1986 on Motions of the Defendant Rodney Baskin for a new trial, etc.; and the Court after hearing the evidence and argument of counsel dictated into the record an opinion overruling said motions and granted Defendant until this date for entry of this formal order.

IT IS THEREFORE ORDERED AND ADJUDGED that the Motions of Defendant for a new trial,etc. filed in this cause be, and the same are hereby overruled and denied.

IT IS FURTHER ORDERED that appearance bond for purposes of appeal

of this cause to the Mississippi Supreme Court be, and same is hereby, set at $10,000.

ORDERED AND ADJUDGED this 21st day of May, 1986.

/s/ William R. Lamb
CIRCUIT JUDGE

BENCH RULING ON POST TRIAL MOTIONS:

EXCERPT FROM THE TRANSCRIPT OF HEARING ON POST TRIAL MOTIONS, May 16, 1986

THE COURT: Mr. Davis, its [sic] the opinion of the court that a motion for a new trial is not well taken, and I am not going to cover it item by item, but simply overrule it in its entirety. The defendant is remanded to the custody of the sheriff. Appearance bond in the event of an appeal is set at $10,000.00 which is the same amount of the bond previously entered in this cause.

-R. at 323-24.

IN THE CIRCUIT COURT

OF LAFAYETTE COUNTY, MISSISSIPPI

VACATION TERM, 1985

THE STATE OF MISSISSIPPI

VERSUS CAUSE NUMBER 11,894

RODNEY EUGENE BASKINS, AKA TARZAN

JUDGMENT OF SENTENCE

This day this cause came on to be heard for the purpose of imposing sentence on the above named Defandant [sic], a JURY VERDICT OF GUILTY having been entered on the 23rd day of October, 1985, in this cause, and sentence having been deferred; and the Defendant and his counsel having been granted the right to review the pre-sentence investigation report and the right of allocation; and counsel for the Defendant and for the State having been granted the opportunity to present evidence in mitigation or aggravating circumstances:

IT IS HEREBY ORDERED AND ADJUDGED that the Defendant, RODNEY EUGENE BASKINS, AKA TARZAN, be and he is hereby, sentenced to serve a term of THREE (3) YEARS in an institution to be designation [sic] by the Mississippi Board of Corrections and to pay a FINE of $1,500.00 for the crime of SIMPLE POSSESSION OF MORE THAN ONE OUNCE OF MARIJUANA. The defendant is granted thrity [sic] days for filing of Post-trial Motions. Bond is set at $10,000.00.

SO ORDERED AND ADJUDGED in open Court this 15th day of November, 1985.

/s/ William R. Lamb
CIRCUIT COURT JUDGE